



# **Pennsylvania Land Use Law Update: Appellate Cases from 2017-2019**

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# Today's Speakers



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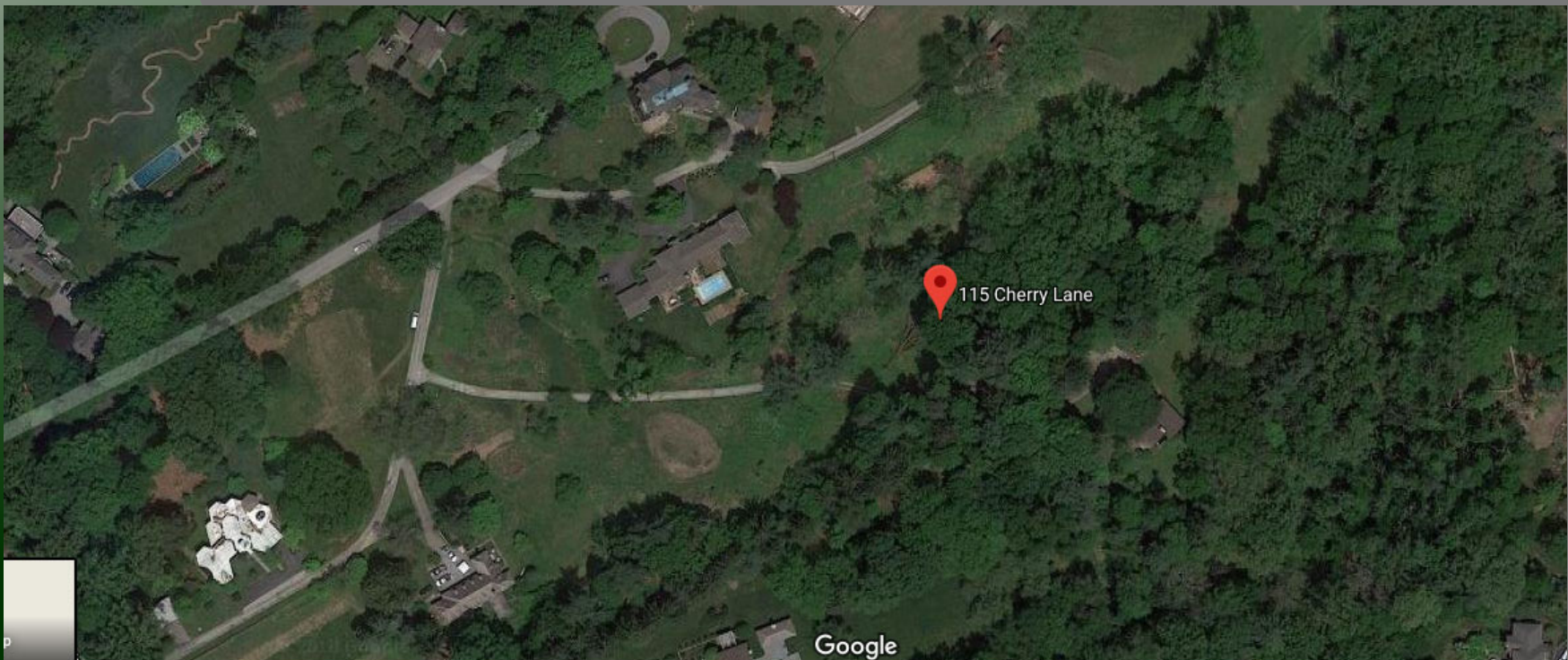
# Ordinance Interpretation

# In re: Jerrehian, 155 A.3d 674 (Pa. Cmwlth. 3/6/2017)(Leavitt)

- Subdivision plan
- Preliminary opinion
- Zoning challenge to lot approval
- Merger of lot

# In re: Jerrehian, 155 A.3d 674 (Pa. Cmwlth. 3/6/2017)(Leavitt) (cont'd)

115 Cherry Lane (3.8 acres)



# In re: Jerrehian, 155 A.3d 674 (Pa. Cmwlth. 3/6/2017)(Leavitt) (cont'd)

TIMELINE	
1958	Acres divided into 4 parcels after death of owner by Orphan's Court; no subdivision plan
1961	50' row shown on Township plan providing access to Pool Lot (115 Cherry Lane)
1968	Subdivision plan showing Pool Lot as having 110 foot frontage on 50 foot row
2003	O'Malley's buy Pool Lot and neighboring 103 Cherry Lane
2005	O'Malley's sell Pool Lot to Stollwerck and Pool Lot to Jerrehian

# In re: Jerrehian, 155 A.3d 674 (Pa. Cmwlth. 3/6/2017)(Leavitt) (cont'd)

- Ordinance required lots to have 90 foot width at street line
- Definitions from Zoning Ordinance
  - Street: A right-of-way, publicly or privately owned, serving as a means of vehicular and pedestrian travel and furnishing access to abutting properties and space for sewers and utilities
  - Right-of-Way: As [I]and used or intended for use as a street, alley or crosswalk



# In re: Jerrehian, 155 A.3d 674 (Pa. Cmwlth. 3/6/2017)(Leavitt) (cont'd)

- Lane providing access had no pavement and did not contain utilities
- Was there a valid subdivision in 1958?
- Is this lot a valid lot where it does front on a public street?
- Were lots merged?

**1050 Ashbourne Assoc. LLC v. Cheltenham Township Board of Commissioners, 167 A.3d 828 (Pa. Cmwlth. 8/1/2017)(Leavitt)**

- Land development plan
- Conflicting overlays
- Bad faith

# 1050 Ashbourne Assoc. LLC v. Cheltenham Township Board of Commissioners, 167 A.3d 828 (Pa. Cmwlth. 8/1/2017)(Leavitt) (cont'd)

TIMELINE	
May 30, 2012	Developer requests special exception for age restricted development under Age-Restricted Overlay
July 2012	Township appends Age-Restricted Overlay to restrict height
June 2013	Special exception approval granted
Sept. 2014	Court affirms after appeal by Township
Dec. 2014	Township notifies developer that Preservation Overlay Districts will apply
June 2015	Developer files sketch plan for 8 dwelling units as required; Township denies

1050 Ashbourne Assoc. LLC v. Cheltenham Township Board of Commissioners, 167 A.3d 828 (Pa. Cmwlth. 8/1/2017)(Leavitt) (cont'd)

- Proposal related Preservation Overlay District limit on number of units per buildings and the 2012 amendments to Age Restricted Overlay limit on height

1050 Ashbourne Assoc. LLC v. Cheltenham Township Board of Commissioners, 167 A.3d 828 (Pa. Cmwlth. 8/1/2017)(Leavitt) (cont'd)

- Which Overlay District applies?
- Did the grant of a special exception expire so as to be subject to amendments to height restriction?

Dambman v. Board of Supervisors of  
Whitemarsh Township, 171 A.3d 969  
(Pa. Cmwlth. 10/6/2017)(PJ Leavitt)

- Appeal of land development approval
- Zoning issues

# Gorsline v. Board of Supervisors of Fairfield Twp., 186 A.3d 375 (PA 6/1/2018) (Donohue)

- Gas well use not in Ordinance
  - Zoning Ordinance neither specifically permitted or prohibited
  - Conditional use
    - Similar and compatible with other uses permitted in the zone
  - Public service facility
    - Public service structures by a utility ...or by a municipality or other governmental agency

# Gorsline v. Board of Supervisors of Fairfield Twp., 186 A.3d 375 (PA 6/1/2018) (Donohue)

(cont'd)

- Essential services
  - Facilities and related equipment of a public utility
- Use not expressly authorized cannot enjoy any presumption of being similar to uses permitted
- Zoning Ordinance can be amended to permit gas wells in any or all zoning districts with limitations and conditions governing body decides are appropriate



## Azoulay v. Philadelphia ZHB, 194 A.3d 241 (Pa. Cmwlth. 9/7/2018) (Cannon)

- Period to object to zoning permit runs from date issued
- No deference owed to agency interpretation of ordinance where ordinance is unambiguous or interpretation plainly erroneous
- New impervious cover in stream protection overlay district within 200 feet of watercourse is prohibited

# Slice of Life, LLC v. Hamilton Twp. ZHB, 207 A.3d 286 (PA 4/26/2019) (Donohue)

- Short term rental (2-7 days)
- Transient use of a house not permitted in residential district limiting the use to single family homes by a “single housekeeping unit”
- Functional analysis as set out in Albert v. ZHB of North Abington Twp., 854 A.2d 401 (2004):
  - “‘Single housekeeping unit’ . . . requires that a group of individuals in a single household must not only function as a family within that household, but in addition, the composition of the group must be sufficiently stable and permanent so as not to be fairly characterized as purely transient”  
(Halfway house with 2-6 month stay ≠ single family)
- Uses not expressly permitted are excluded by implication

# Validity Challenges

Delchester Developers, L.P. v. v. Zoning Hearing Board of Township of London Grove, 161 A.3d 1081 (Pa. Cmwlth. 5/9/2017)(S.J. Colins)

- Township's SWMO was not a "land use ordinance" whose validity was within the Township's ZHB's jurisdiction to consider
- Zoning ordinance's restriction on development in groundwater protection district did not violate developer's right to substantive due process
- Zoning ordinance's restriction on development in groundwater protection district did not constitute a taking

Delchester Developers, L.P. v. London Grove Township Board of Supervisors, 161 A.3d 1106 (Pa. Cmwlth. 5/9/2017)(S.J. Colins)

- Subdivision denial
  - Specificity of denial
  - Incorporation of independent consultant reviews
  - Outside agency approvals
  - Claim of bad faith
- Substantive basis for denial; not mere technical defects
- No bad faith found

# Frederick v. Allegheny Tp. ZHB, 196 A.3d 677 (Pa. Cmwlth. 10/26/2018) (Leavitt)

- Objectors failed to prove oil and gas operations incompatible with district
- Ordinance did not violate Environmental Rights Amendment
- Two judges disagreed and wrote separate opinions

# In re: Appeal of Penneco Environmental Solutions, LLC, 205 A.3d 401 (Pa. Cmwlth. 3/8/2019)

- Substantive validity challenge to ordinance – ripeness
- Gas well conversion did not have to first obtain DEP permit before filing challenge to ordinance

# Wimer Realty, LLC v. Tp. of Wilmington, 206 A.3d 627 (Pa. Cmwlth. 3/27/2019) (McCullough)

- Zoning ordinance unconstitutionally exclusionary for barn wedding venue
- Curative amendment proposed conditions could be imposed on challenger's use



## DeAngelo v. North Strabane Tp. ZHB, 208 A.3d 156 (Pa. Cmwlth. 4/17/2019) (Leavitt)

- Validity challenge based on de facto exclusion of medical clinics; use permitted elsewhere
- Restriction on medical clinics in the R-3 district was rationally related to a legitimate purpose
- Owner was not given fair opportunity to present case for a variance

# Circleville Road Partners, L.P. v. Tp. of Ferguson, 209 A.3d 1125 (Pa. Cmwlth. 5/15/2019) (Fizzano Cannon)

- Zoning text amendment
- Notice provisions for zoning map change not followed
- Procedural challenge

# Yannaccone v. Lewis Tp. Bd. of Supervisors, \_\_\_ A.3d \_\_\_ (Pa. Cmwlth. 8/9/2019) (Covey)

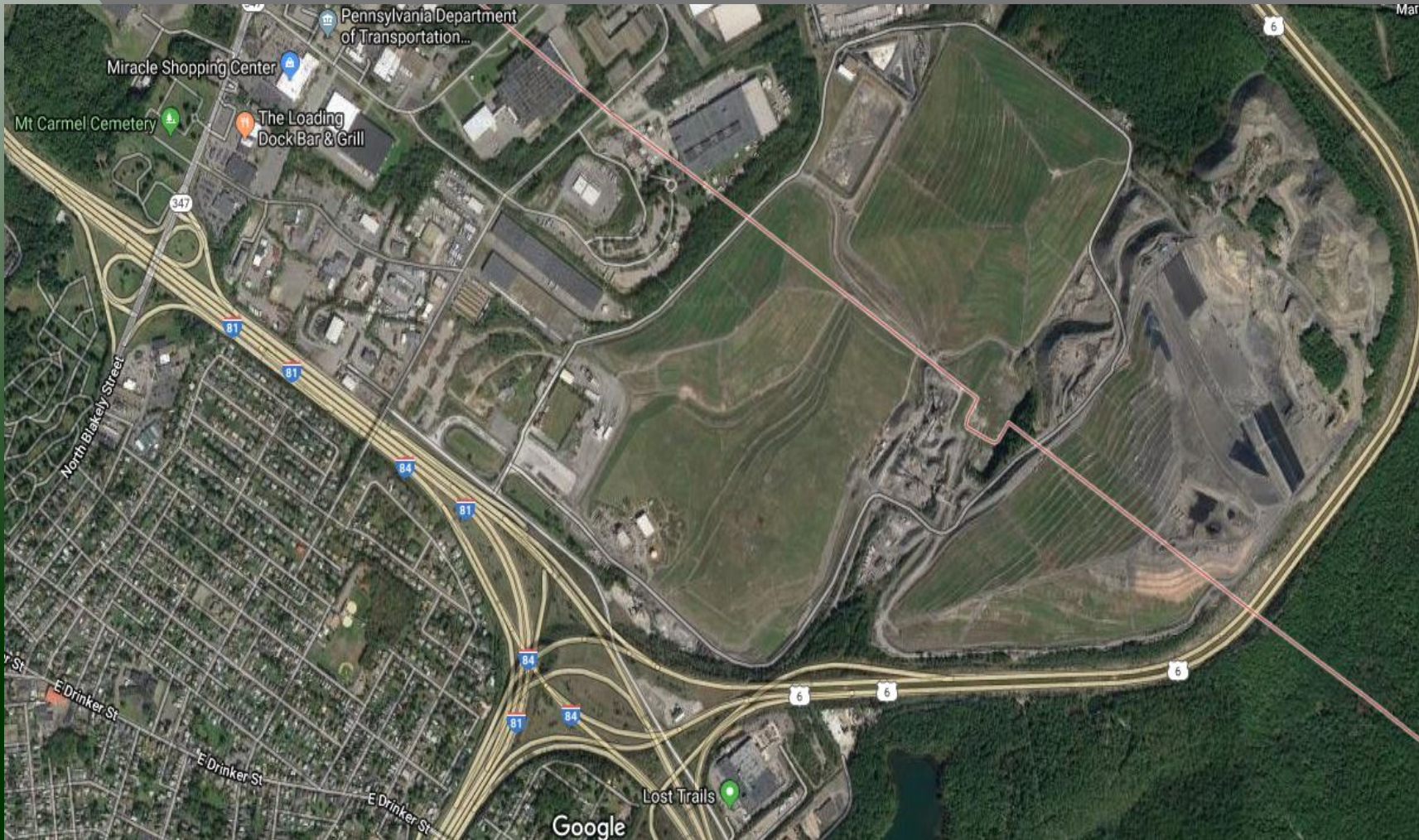
- Procedural challenge to ordinance
- Ordinance drafted by zoning committee not planning commission
- Notice of meetings required
- Strict compliance if challenged within 30 days of effective date

# Standing of Objectors

# Pennypacker v. Ferguson Tp., 167 A.3d 209 (Pa. Cmwlth. 5/17/2017)(S.J. Colins)

- Objectors appealed approval of Final PRD Plan
- MPC prohibits appeals from Final PRD approvals where Tentative Plan approval not appealed
- Objectors did not allege in Notice of Appeal that the Final Plan was different from Tentative Plan
- Appeal quashed because the Objectors waived only allowable issue
- Petition for review to Supreme Court is pending

# Friends of Lackawana v. Dunmore Borough ZHB, 186 A.3d 525 (Pa. Cmwlth 5/7/2018) (Simpson)



# Friends of Lackawana v. Dunmore Borough ZHB, 186 A.3d 525 (Pa. Cmwlth 5/7/2018) (Simpson) (cont'd)

- Preliminary Opinion
  - Zoning Officer preliminary opinion §916.2
  - Landfill expansion did not violate building height limit
  - Expansion upward would not have roof supported by walls
- Standing of Objectors
  - ZHB and Trial Court dismissed appeals - lack of standing
  - Objectors lived ¼ to ½ mile from existing landfill
  - Separated by interstate and major interchange

## Worthington v. Mount Pleasant Tp., 212 A.3d 583 (Pa. Cmwlth. 6/6/2019) (Covey)

- Conditional use application for gas well site
- Objector lived 3 miles away, but granddaughter went to school within 1 mile
- ZHB properly denied party status
- Appeal rejected



# Plaxton v. Zoning Board of Adjustment, 213 A.3d 374 (Pa. Cmwlth. 7/9/2019)

- Dimensional variances for parking in Philadelphia
- Objectors who owned properties in the immediate vicinity of subject property
- Unclean hands argument against objectors does not apply to land use appeals

# Enforcement Actions

# Smith v. Ivy Lee Real Estate, LLC, 165 A.3d 93 (Pa. Cmwlth. 6/27/2017) (Hearthway)

- Private action to enforce provisions of subdivision ordinance
- MPC §617 provides mechanism for action to enforce

# DiMattia v. Zoning Hearing Board of East Whiteland Tp., 168 A.3d 393 (Pa. Cmwlth. 8/8/2017)(S.J .Colins)

- Zoning enforcement
- Use of residential garage for preparation, repair and transport of race cars
- Accessory use

# Borough of West Conshohocken v. Soppick, 164 A.3d 555 (Pa. Cmwlth. 3/29/2017)(Leavitt)

- Notice of violation
- Enforcement action
- Penalties pending appeal

# Borough of West Conshohocken v. Soppick, 164 A.3d 555 (Pa. Cmwlth. 3/29/2017)(Leavitt)

(cont'd)

TIMELINE	
1996	Permit issued for 1 story garage
4/23/99	Stop work order issued by Zoning Officer for 2 story garage
6/11/04	ZHB denies appeal
2/21/07	TC affirms ZHB
3/07	Appeal to Commonwealth Court
6/19/07	Enforcement Notice issued
10/4/07	Magistrate judgement (\$7,038)
11/23/07	Complaint filed by Borough (\$47,100)
2/19/08	Commonwealth Court affirms ZHB matter
8/27/08	Garage removed
2011	Amended complaint (\$130,500)

# Township of Robinson v. Esposito, 210 A.3d 1146 (Pa. Cmwlth. 5/31/2019)(Fizzano Cannon)

- Contents of notice of enforcement
- Effect of failure to comply with requirements of notice

# Sowich v. Zoning Hearing Bd. of Brown Tp., 214 A.3d 775 (Pa. Cmwlth. 7/29/2019)(Leavitt)

- Defense to enforcement notice
- Nonconforming use; proof of existence is burden of landowner
- Proof of abandonment is burden of municipality

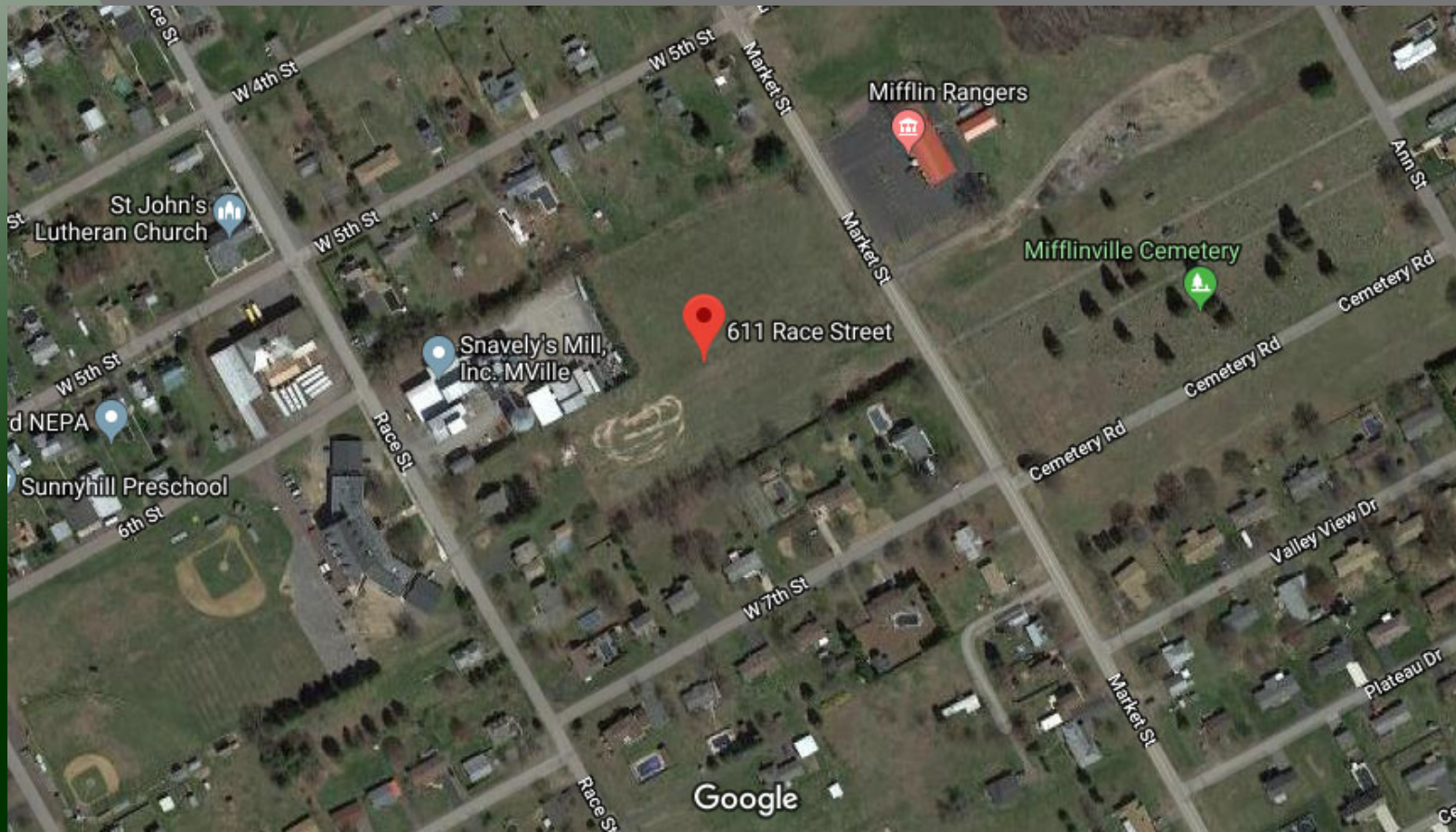


# Special Exceptions and Conditional Uses

**Marr Development Mifflinville, LLC v. Mifflin Township Zoning Hearing Board, 166 A.3d 479 (Pa. Cmwlth. 7/3/2017)(Jubelirer)**

- Special exception
- Grounds for denial of request
- Compatible with surrounding area

# Marr Development Mifflinville, LLC v. Mifflin Township Zoning Hearing Board, 166 A.3d 479 (Pa. Cmwlth. 7/3/2017)(Jubelirer) (cont'd)



# Marr Development Mifflinville, LLC v. Mifflin Township Zoning Hearing Board, 166 A.3d 479 (Pa. Cmwlth. 7/3/2017)(Jubelirer) (cont'd)

- Compatibility – The proposed use shall be in the best interest of properties in the general area as well as the community at large. The proposed use will be reviewed as to its relationship to and effect on surrounding land uses and existing environmental conditions regarding the pollution of air, land and water; noise; potential of hazards and congestion; illumination and glare; restrictions to natural light and circulation of air
- Single Family Detached – Permitted by right
- Single Family Attached (Duplex) – Permitted by special exception limited to 2 units

# Appeal of Grande Land, L.P., 174 A.3d 1178 (Pa. Cmwlth. 11/18/2017)(Brobson)

- Denial of special exception
- Record evidence

# Appeal of Grande Land, L.P., 174 A.3d 1178 (Pa. Cmwlth. 11/18/2017)(Brobson) (cont'd)

- Specific requirements for special exception?
  - “The proposed development shall be served by public water supply and sewage disposal systems approved by [DEP].”

Tower Access Group, LLC v. South Union Tp. ZHB,  
192 A.3d 291 (Pa. Cmwlth. 7/30/2018) (McCullough),  
appeal denied, 203 A.2d 981 (PA 3/11/2019)

- Special exception for cell tower
- Applicant's burden to show compliance with specific requirements
- Substantial evidence of harm to public
  - Burden of applicant, municipality or objectors?

# Siya Real Estate LLC v. Allentown City ZHB, 210 A.3d 1152 (Pa. Cmwlth. 5/31/2019) (Fizzano Cannon)

- Special exception burden for non-specific standards
- Objectors have initial burden of proof
- Impact greater than what would otherwise be expected



## EQT Production Co. v. Borough of Jefferson Hills, 208 A.3d 1010 (Pa. 5/31/2019)(Todd)

- Conditional use application for natural gas well
- Applicant met specific requirements, but Council denied use finding applicant did not prove that use would not be detrimental to public welfare and did not prove consistency with Environmental Rights Amendment
- Commonwealth court held objectors failed to meet burden of proving harm to the general health, safety and welfare beyond what is normally expected from use
- Held: Testimony of objectors about personal experiences with similar facility run by same applicant in neighboring municipality was sufficient relevant evidence, not speculation

# In re: Bd. of Comm. of Cheltenham Tp., 211 A.3d 845 (Pa. 7/17/2019) (Baer)

- Sketch plan protection from Intervening ordinances
- Extends to zoning approvals required to implement plan

# Variance Standards

## W.J. Menkins Holdings LLC v. Douglass Tp., 208 A.3d 190 (Pa. Cmwlt. 5/2/2019) (Covey)

- Use variance conditions restricting hours
- Valid conditions if supported by evidence

**South Broad Street Neighborhood Assoc. v. ZBA of the City of Philadelphia, 208 A.3d 359 (Pa. Cmwlth. 5/7/2019) (Brobson)**

- Standards for modification of variance conditions
- Change in circumstances or proof of hardship under traditional variance standards

Vineyard Oil & Gas Co. v. Northern East Tp.  
ZHB, 215 A.3d 77 (Pa. Cmwlth. 7/31/2019)  
(Covey)

- Cell tower dimensional variance request
- Proof of hardship still required
- Current use was viable and productive

# Riccio v. Newtown ZHB, \_\_\_\_ A.3d \_\_\_\_ (Pa. Cmwth. 9/10/2019) (Brobson)

- Quorum of Board not present
- Appointment of hearing officer
- Due process

# Grounds for Denial of Subdivision & Land Development



**Delchester Developers L.P. v. London Grove Tp. Bd. of Supervisors, 161 A.3d 1106 (Pa. Cmwlth. 5/9/2019) (S.J. Collins)**

- Specificity of reasons for denial
- Incorporation by reference of consultant reviews
- Outside agency approvals

In re: Appeal of Provco Pinegood  
Sumneytown, LLC, \_\_\_ A.3d \_\_\_ (Pa. Cmwlth.  
7/29/2019) (Simpson)

- Zoning officer report to Board did not have to be appealed
- Zoning issues not sufficient grounds for denial
- Sufficient grounds for denial based on site access concerns
- Single basis is enough to deny plan

# Preemption of Local Regulation

## Sugar Grove Tp. v. Byler, 191 A.3d 84 (Pa. Cmwlth. 7/20/2018) (McCullough)

- Religious liberty argument against application of Privy Ordinance to Amish farm
- Retroactive application of ordinance to existing facilities also requires specific language

# Berner v. Montour Township Zoning Hearing Board, \_\_\_ A.3d \_\_\_ (Pa. 9/26/2019) (Baer)

- Special exception standards
- Manure storage
- Nutrient management act preemption

# Berner v. Montour Township Zoning Hearing Board, \_\_\_ A.3d \_\_\_ (Pa. 9/26/2019) (Baer) (cont'd)

- Zoning Ordinance § 402(1)(E)
  - Intensive Agriculture and Agricultural Support
    - Commercial feedlots, veal finishing, hog raising, poultry breeding or egg or meat production operations, livestock auctions, wholesale produce centers, fertilizer and seed distributors, commercial horse farms, grain storage and feed mills, and similar uses shall submit facility designs and legally binding assurances with performance guarantees which demonstrate that all facilities necessary for manure and wastewater management, materials storage, water supply and processing or shipping operations will be conducted without adverse impact upon adjacent properties. Adverse impacts may include, but are not limited to, groundwater and surface water contamination, groundwater supply diminution, noise, dust, odor, heavy truck traffic, and migration of chemicals offsite.

# Questions?

